No. 93-1023

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF LOS ANGELES,
Petitioner,
vs.
TOPANGA PRESS, INC.; STUART PARR; BRAND X VIDEO, INC.; E.W.A.P., INC.; LIBRARY ONE, INC.; HARDROCK, INC.; BEVERLY BOOKS, INC.; WHITEY, INC.; NEW WAVE, INC.; N.F.M. CORPORATION; PLUSH BOUTIQUE; CAROLINA ENTERPRISES; DASH, INC.; JOTH, INC.; JOAMAR, INC.; JAN RUBINI; 7180 SUNSET BLVD., INC.; A.L.Q. CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES K. HAHN
City Attorney
CLAUDIA MCGEE HENRY
Senior Assistant City Attorney
ANTHONY SAUL ALPERIN
Assistant City Attorney
L. WAYNE MOONEY
Deputy City Attorney and
Counsel of Record
Los Angeles City Attorney's Office
200 North Main Street
Room 1700, City Hall East
Los Angeles, California 90012
(213) 485-6627
Attorneys for Petitioner

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

QUESTIONS PRESENTED

1. Should certiorari be granted to correct the Court of Appeals' decision which is in direct conflict with *Young v. American Mini Theatres*, 427 U.S. 50, 49 L.Ed.2d 310 (1976); *City of Renton v. Playtime Theatres*, 475 U.S. 41, 89 L.Ed.2d 29 (1986); and *Barnes v. Glen Theatre, Inc.*, 501 U.S. __, 115 L.Ed.2d 504 (1991)?

2. Did the District Court abuse its discretion by issuing a preliminary injunction against enforcement of Los Angeles' adult entertainment zoning ordinance as violative of the First and Fourteenth Amendments to the Constitution of the United States?

3. Is the respondents' lawsuit, filed without any claim or evidence that any respondent cannot find an alternative site for its business, ripe for adjudication in the federal courts under the standards established in *Reno v. Catholic Social Services*, __ U.S. __, 125 L.Ed.2d 38, 113 S.Ct. 2485 (1993)?

4. Are respondents' claims barred by the statute of limitations as determined by reference to *Wilson v. Garcia*, 471 U.S. 261, 85 L.Ed.2d 254 (1985)?

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

CITY OF LOS ANGELES,
Petitioner,
vs.
TOPANGA PRESS, INC.; STUART PARR; BRAND X VIDEO, INC.; E.W.A.P., INC.; LIBRARY ONE, INC.; HARDROCK, INC.; BEVERLY BOOKS, INC.; WHITEY, INC.; NEW WAVE, INC.; N.F.M. CORPORATION; PLUSH BOUTIQUE; CAROLINA ENTERPRISES; DASH, INC.; JOTH, INC.; JOAMAR, INC.; JAN RUBINI; 7180 SUNSET BLVD., INC.; A.L.Q. CORPORATION,[1]
Respondents.

PETITION FOR WRIT OF CERTIORARI

The City of Los Angeles ("City") hereby petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

The City has enacted an adult entertainment zoning ordinance consistent with the clear authority of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L.Ed.2d 310 (1976) ("*Young*"), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L.Ed.2d 29 (1986) ("*Renton*").

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[1] All parties to this proceeding are listed in the caption of this petition.

The District Court abused its discretion and preliminarily enjoined the enforcement of the City's ordinance, citing serious questions as to the presence of available sites. In order to affirm the District Court, the Court of Appeals then compounded the District Court's error grievously by rendering a decision that tore this Court's *Young* and *Renton* holdings asunder. The Court of Appeals, contrary to the strictures of this Court which emphasized that the inquiry in such cases is not concerned with economic impact, reimposed requirements of commercial viability and economic access upon the City's potential sites and only after doing so upheld the District Court's injunction. By defying this Court's decisions, the Court of Appeals has relegated the City to the status of real estate broker for a specialized clientele — adult business owners.

The decision of the Ninth Circuit also is in conflict with the decisions of other circuits, which have assiduously followed the *Renton* and *Young* analysis. Furthermore, the Court of Appeals opinion is in conflict with a case of the California Supreme Court which evaluated an adult business zoning case in light of *Young* and *Renton*.

Moreover, the Court of Appeals decision conflicts with *Barnes v. Glen Theatre, Inc.*, 501 U.S. __, 115 L.Ed.2d 504 (1991), which upheld an Indiana statute banning public nudity as applied to commercial nude dancing, by preventing enforcement of the City's ordinance against adult cabarets.

The application of *Renton* and *Young* further requires a determination that the District Court abused its discretion issuing the injunction. In addition, this case is neither ripe for adjudication nor have respondents filed the action within the applicable statute of limitations.

OPINIONS AND ORDERS BELOW

1. The Court of Appeals, March 22, 1993, opinion below is reproduced in Appendix ("App.") A. That court's order and opinion upon the granting of rehearing is reported at 984 F.2d 1254 and reproduced in App. B.

2. The June 22, 1991 Order of the District Court granting the preliminary injunction, which was unreported, is reproduced in App. E.

JURISDICTION

The District Court asserted jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The Court of Appeals jurisdiction was based on 28 U.S.C. § 1292(a)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 2103.

The Court of Appeals denied petitioner's petition for rehearing on August 31, 1992 (App. C 1-2) and respondents' petition for rehearing in September 20, 1993. App. C 3. By order of Justice Sandra Day O'Connor, pursuant to Rule 13.4 of this Court, the date for filing this Petition was extended to Sunday, December 19, 1993.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case principally involves the First and Fourteenth Amendments to the United States Constitution and two of the City's ordinances affecting the zoning of adult entertainment businesses, Los Angeles Municipal Code sections 12.70 and 12.22A20. The First Amendment states in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

The Fourteenth Amendment declares in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The Municipal Code sections are set forth in their entirety in App. F.

STATEMENT OF THE CASE

A. The History and Background for the City's Ordinance

On January 12, 1977, the Los Angeles City Council ("Council") instructed the City's Planning Department and other city agencies to conduct a comprehensive study to determine whether concentration of adult entertainment establishments had a blighting or degrading

effect on nearby neighborhoods. App. F 1. The Study determined the deleterious effect of adult businesses on the community. The Study concluded that "concentrations of adult entertainment businesses have, in some cases, had direct negative impact on property values." In public meetings summarized in the Study, members of the community testified to the negative effects of adult entertainment businesses.

Section 12.70 was enacted in 1978, at which time it prohibited adult businesses from being established, substantially enlarged or subject to transfer of ownership within 500 feet from churches, schools or parks, or within 1,000 feet of another adult business. In the preamble of the 1978 ordinance (App. F 1-2), the Council, relying on the 1977 Study by the Planning Department, found that "the concentration of such adult businesses tends to result in the blighting and degrading of the areas of such concentration. . . ." The ordinance stated that the separation requirements were enacted to prevent the further concentration of the businesses and "the continued erosion of the character of affected neighborhoods of the City; . . ." App. F 2.

Effective May 13, 1983, the Council enacted Ordinance No. 157,538, which amended Section 12.70C to prohibit the maintenance of more than one adult business in the same building or structure. App. F 8.

Effective January 13, 1984, the Council passed Ordinance No. 158,579, a moratorium ordinance which first addressed the separation requirements between adult businesses and residential or "R" zones in the City. The ordinance forbade the establishment of new adult

businesses "within 500 feet of any lot in an 'A' or 'R' zone, or within the 'CR', 'C1', or 'C1.5' zones in the City of Los Angeles." Ordinance No. 158,579 was accompanied by a further Planning Department Study that detailed additional blighting effects of adult businesses in Los Angeles and also set forth the similar results of a related Phoenix, Arizona, study.

Finally, in 1986 the Council enacted Ordinance No. 161,111 ("1986 Ordinance"). The 1986 Ordinance prohibited the continued operation, after March 6, 1988, of adult businesses which did not meet the distance requirements of the 1984 moratorium ordinance. App. F 8.

The 1986 Ordinance also amended Section 12.22A20 (a) (App. F 11-12) to provide a procedure allowing the continued operation of adult businesses whenever "a site consistent with Section 12.70C is not reasonably available elsewhere in the City for the establishment or relocation of the subject adult entertainment business." Section 12.22A20 is not challenged in this action.

The 1986 Ordinance also provided in Section 12.22A20(b) that an adult entertainment business existing on March 6, 1986, could continue in operation until March 6, 1991, by virtue of an extension granted by the City's Office of Zoning Administration if it could establish either undue financial hardship based on investment or the existence of a written lease extending past March 6, 1988. App. F 12-14.

In a 1985 Study supporting adoption of the 1986 Ordinance, the City's Planning Department determined that numerous adult businesses, including 39 "Bookstores/Arcades," still were operating within the City.

The 1985 Study described public hearings and responses to questionnaires which produced additional evidence of the degrading effects of adult businesses on nearby areas. The 1985 Study also described a 1984 Los Angeles Police Department report that showed a statistical correlation between the rise of crime and an increase in number of adult businesses.

B. Proceedings Below

In February 1991 respondents filed a First Amended Complaint and separate individual complaints pursuant to 42 U.S.C. § 1983 challenging the constitutionality of Section 12.70. Respondents specifically challenged those portions of Section 12.70C that prohibit current adult businesses from being maintained within 500 feet of an "R" zone and that forbid the operation of more than one adult business in one building. In addition, respondents claimed that the combination of location restrictions in Section 12.70 unconstitutionally limits the alternative avenues of expression for protected free speech in the City. Respondents also challenged as vague the City's definitions of "adult arcade," "adult bookstore," and "adult cabaret." [2]

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[2] Respondents DASH, INC., JOMAR, INC., JOTH, INC., CAROLINA ENTERPRISES, INC., 7180 SUNSET BLVD., INC., and A.L.Q. CORPORATION alleged they are "adult cabarets within the meaning of Section 12.70 B." The amended complaints filed by the plaintiffs in August 1991 confirm that only TOPANGA PRESS does not claim to be an adult business according to the definition of Section 12.70. All respondents except BRAND X alleged that their businesses are within 500 feet of an "R" zone in the City.

(continued)

Respondents alleged that the combined impact of the City's ordinances would force the closure of the "overwhelming majority of existing adult businesses." If they must vacate their present premises, according to the complaints, respondents would not be able to relocate "due to a lack of an adequate number of commercially viable and/or legally available relocation sites." The respondents who operate combination bookstores and arcades asserted separately that the City Council had no basis for prohibiting their joint operation in 1983, and that their relocation as two separate businesses will be "commercially impossible."

The respondents alleged they have not sought an exception pursuant to Section 12.22A20(a) because it is too expensive, "coupled with its futility." The respondents defined futility by stating that their application would be denied "if there is a single available site."

Respondents simultaneously filed three separate motions for a preliminary injunction. The first requested relief from the residential proximity restriction enacted in 1986. The second contended that the City's requirement, enacted in 1983, that adult businesses be placed in separate buildings was enacted without substantial justification. The third sought an injunction based on the claim that the ordinance was unconstitutionally vague.

(fn. continued)
Respondents PLUSH BOUTIQUE and CAROLINA ENTERPRISES, INC. alleged that they operate within the same building. Respondents N.F.M., INC., PLUSH BOUTIQUE; BEVERLY BOOKS, INC.; PARR; BRAND X; WHITEY, INC.; HARDROCK, INC.; NEW WAVE, INC.; and E.W.A.P., INC. operate stores that both sell sexually oriented media items and contain viewing booths.

The City opposed respondents' motions for an injunction. The City also filed a Motion to Dismiss the complaints, contending in part that respondents had failed to obtain a final City determination as to the use of their property. In addition, the City filed a Motion to Abstain.

On June 17, 1991, the District Court granted the respondents' motions. App. E. The court at the hearing on the motions stated:

> "[The respondents] have raised serious questions. There's no doubt about that. And the hardships are negligible to the City, if any at all, in the sense that there has been a forbearance of enforcement of this regulation for a long time, and I'm going to get to the issue real quickly." App. D 3.

The District Court denied the City's motions to dismiss and to abstain.

On March 22, 1993, the Court of Appeals affirmed the District Court's order. App. A. On April 23, 1993, the Court of Appeals issued an amended opinion. App. B. That opinion made technical changes in the March opinion. Petitioner directs this Court to the amended opinion for purposes of this Petition.

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant The Petition To Review The Ninth Circuit's Refusal To Follow The Law Set Forth In *Young* and *Renton*

The Court of Appeals opinion effectively nullifies the law stated in *Young* and *Renton*. The Court of Appeals in order to reach its decision re-introduced a "commercial viability" criterion for determining the availability of alternative sites. The lower court has effectively ruled that the City has a constitutional obligation to assure the existence of sites for adult business.

Young and *Renton* established that local governments are entitled to regulate the location of businesses which purvey adult material. *Young*, 427 at 62-63, 49 L.Ed.2d at 321-322; *Renton*, 475 U.S. at 52, 89 L.Ed.2d at 41. The Supreme Court in *Renton* stated the test for adult entertainment zoning ordinances as follows:

> "The Renton ordinance, like the one in *American Mini Theatres,* does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation. *Id.*, at 63, and n. 18, 96 S.Ct. at 2448 and n. 18; *id.*, at 78-79, 96 S.Ct., at 2456 (POWELL J., concurring).
>
> * * *

> "[S]o-called 'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. [Citations.]" 475 U.S. at 46-47, 89 L.Ed.2d at 37.

A zoning classification based on the adult character of a business does not violate the First Amendment. The *Young* court explained:

> "We have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the City. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Id.*, 427 U.S. at 62, 49 L.Ed.2d at 321.

The City's zoning ordinance *on its face* classifies adult entertainment businesses in a manner similar to the ordinances upheld by the Supreme Court. *Young, supra*, 427 U.S. at 70-73, 49 L.Ed.2d at 326-27; *Renton, supra*, 475 U.S. at 44, 89 L.Ed.2d at 36.

In 1976, in his concurring opinion in *Young*, Justice Powell stated:

> "The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustain zoning against claims of serious economic damage. The inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of this ordinance upon freedom of expression." *Young*, 427 U.S. at 78, 49 L.Ed.2d at 330 (Powell, J., concurring.)

In 1981, Renton, Washington, enacted an ordinance that precluded an adult motion picture theater from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church or park, or within one mile of any school. This Court adopted the District Court's finding that 520 acres of the City's land was open to use as adult theater sites.

> "[T]he 520 acres of land consists of 'ample, accessible real estate,' including 'acreage in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways, and roads.' " *Renton*, 475 U.S. at 53, 89 L.Ed.2d at 29.

The Renton theater owners had argued in the Court of Appeals that because some of the available acreage was already occupied, most of the undeveloped land was not currently for sale or lease, and there were no "commercially viable" sites, the ordinance substantially restricted speech. *Id.*, 475 U.S. at 53-54, 89 L.Ed.2d at 41-42. However, in a holding that governs the resolution of this case, the Court stated:

> "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' *American Mini Theatres*, 427 U.S., at 71, n. 35, 96 S.Ct., at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See *id.*, at 78, 96 S.Ct., at 2456 (POWELL, J., concurring) ('The inquiry for First Amendment purposes is not concerned with economic impact'). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the

> city, and the ordinance before us easily meets this requirement." *Id.*, 475 U.S. at 54, 89 L.Ed.2d at 42.[3]

In defiance of *Young* and *Renton*, the Court of Appeals in this case, after an obligatory acknowledgement that *Renton prohibited* consideration of economic impact (App. B 8 - B 9), went on to *consider* economic impact:

> "For purposes of *Renton*, the distinction is between consideration of *economic impact within* an actual business real estate market and consideration of *cost* to determine whether a specific relocation site *is part* of the relevant market. A court may not consider the former, but it *may* consider the latter when determining whether a specific site is *reasonably*

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[3] The Court of Appeals opinion in *Renton* set forth the circumstances it believed demonstrated the *unavailability* of certain sites:

> "A substantial part of the 520 acres is occupied by:
> (1) a sewage disposal site and treatment plant;
> (2) a horseracing track and environs;
> (3) a business park containing buildings suitable only for industrial use;
> (4) a warehouse and manufacturing facilities;
> (5) a Mobil Oil tank farm; and
> (6) a fully-developed shopping center."
> *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 534 (9th Cir. 1984).

This Court explicitly *rejected* the notion that these sites were unavailable for purposes of determining the restrictive impact of an adult business zoning ordinance.

> *suitable* for the operation of a business." App. B 10, emphasis added and in the court's opinion.

Without blinking, the Court of Appeals simply discarded this Court's admonition that "we have never suggested that the First Amendment compels the Government to ensure that adult theaters . . . will be able to obtain sites at bargain prices." *Renton*, 475 U.S. at 54, 89 L.Ed.2d at 42. The Ninth Circuit has rejected *Renton*'s "money-blind" test. *Renton* requires adult businesses to "fend for themselves." *Ibid.* That is how the market operates, and that is why this Court held that accessible real estate could include a variety of properties.

The reason for the Court of Appeals' approach is apparent: the evidence produced by respondents would not support the injunction unless economic factors were considered to determine availability of alternative sites.

There is no evidence in the record that any respondent cannot find an alternative relocation site in the City for its adult business. The declarations in support of the motion for preliminary injunction assert only that there may be market barriers to relocation and that it will be difficult for the businesses to survive.

The Field Survey and deposition of respondents' witness Michael F. Taugher and the declaration of respondents' witness Bruce J. Bailey establish that sufficient alternative avenues of communication for adult entertainment exist in the City of Los Angeles. Mr. Taugher found 19,053.8 acres in the City to be "definitionally permissible" areas, *i.e.*, land outside the distance restrictions of Section 12.70. After eliminating acreage "where it would be physically or practically impossible to locate," Mr. Taugher admitted that the

City supplied a land area of 7,440.9 acres where an adult business could locate.

Moreover, Mr. Taugher stated that he eliminated many of the properties from consideration in part based on fiscal impracticality, because he felt that the premises could not be purchased or used as a commercial enterprise, because one integral business occupied the property, or because the business at the site was large. Thus, many of the areas Mr. Taugher eliminated as not realistically available are constitutionally available under *Renton*.

The true picture drawn by Mr. Taugher of the City's commercial and manufacturing zones is an incredible profusion of office, retail, service, and manufacturing uses of many sizes, legally available for use as adult business locations. Mr. Taugher conceded as much and even located sites for many of the respondents near their current places of business. Moreover, it is clear from the zoning maps in evidence that streets, highways and freeways provide access to all portions of the City where the available locations exist. This is precisely the type of market that *Renton* anticipates adult businesses can enter into on an equal footing.

Bruce J. Bailey's declaration stated that he found "approximately 500,000 separate parcels of land" within the "definitionally permissible" area as identified by Mr. Taugher. However, contrary to *Renton*, he eliminated approximately 99 percent of these properties "as not being viable," in large part because of "prohibitive cost," the facilities being "simply out of the reach of any small commercial user . . ." or "prohibitively expensive," and on the ground that the properties were "located within areas which simply failed to meet the basic requirements of any retailer." Nevertheless, the Court of Appeals sanctioned the use of respondent's

evidence of economic impact to support the preliminary injunction.[4]

In case there is any doubt about the import of its opinion, the Court of Appeals discussed at some length the financial and economic factors that cities must weigh to aid adult businesses in their search for available sites. App. B 10, *et seq.* For example, the appeals court stated that it may legitimately consider "the cost of altering or developing the area to change its physical characteristics." App. B 11.

In addition, the Circuit Court's opinion required that a city must be prepared to find sites for the businesses which are "reasonably accessible to the general public" to be part of the market. App. B 13. Not only is this a substitution of a vague and unworkable test for *Renton*'s approval of "acreage . . . that is criss-crossed by freeways, highways, and roads"; it also implies a factor based upon economic advantage. Justice Powell in his concurrence in *Young*, stated that whether "some prospective patrons may be inconvenienced by this dispersal" cannot be a factor in evaluating an ordinance's constitutionality. *Id.*, 427 U.S. at 79, 49 L.Ed.2d at 331.

Problematically, the Court of Appeals declared that "when a relocation site suits some generic commercial enterprise, although not every particular enterprise, it too may be said to be part of the real estate market." App. B

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[4] The Court of Appeals acknowledged that Mr. Taugher confirmed that at least 7,440 acres of the City were "realistically available" (App. B 15) and that Mr. Bailey determined that 120 "potentially viable" sites existed. *Ibid.* The court conceded that these figures support the ordinance but suggested that "a risk exists" that they are "misleading." App. B 18. The Court of Appeals bypassed the admissions in Mr. Bailey's declaration and only stated perfunctorily that he "improperly" used economic and other factors to eliminate sites. App. B 15.

13. The word "suits" results in an economic analysis, as does the court's suggestion that the determination of availability rests ultimately on whether "any business would choose" the location. *Ibid.*[5]

The application of the lower court's extraordinary opinion will shake the foundation of local laws enacted in reasonable reliance on *Young* and *Renton*. The Court of Appeals opinion is so fundamentally in conflict with *Young* and *Renton* that certiorari should be granted.

B. The Petition Should Be Granted To Review the Court Of Appeals Decision In Light Of *Barnes*

The Court of Appeals in its rush to judgment also ignored the effect of this Court's ruling in *Barnes v. Glen Theatre, Inc.*, 501 U.S. __, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), on the complaints brought by the adult cabarets.

In *Barnes*, the respondents included "two establishments . . . that wish to provide totally nude dancing as entertainment, . . ." 115 L.Ed.2d at 509. The plurality opinion held that Indiana's statute prohibiting public nudity furthered the substantial interest of the state in protecting societal order and morality; that it prohibited not the erotic message of dancing but only public nudity; and that it imposed an incidental restriction on

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[5] The Court of Appeals included within the market only areas with "a proper infra-structure." App. B 13. Yet even "raw land" is considered accessible under *Renton*. 475 U.S. at 53, 89 L.Ed.2d at 41. The appeals court also stated: "[T]hose relocation sites which are commercially zoned are part of the market." App. B 13. There is no requirement in *Young* and *Renton* that a location be commercially zoned to be available.

expression no greater than was essential to the furtherance of the governmental interest. *Id.*, 115 L.Ed.2d at 513-515.

Justice Scalia would have held the law valid as a general law regulating conduct and thus not subject to First Amendment scrutiny at all. *Id.*, 115 L.Ed.2d at 515-521. According to the concurring opinion of Justice Souter, Indiana was permitted to ban commercial nude dancing based upon the judicially noticeable secondary effects that the establishments create. *Id.*, 115 L.Ed.2d at 522-525.

The issue of the propriety of the City's regulation of the adult cabaret respondents in this case cannot be resolved differently than that of the Indiana statute in *Barnes*. Section 12.70 does not ban nude dancing in business establishments. Even though adult businesses cause recognized secondary effects, Section 12.70 makes thousands of acres in industrial and commercial zones available for those businesses. After *Barnes* there can be no doubt that the City's regulation of the adult cabarets survives constitutional scrutiny.

C. This Court Should Grant Review To Resolve The Conflict Between The Decision Below And Those Of Four Other Courts Of Appeals In Applying The Standards Of *Renton* And *Young*

When the Court of Appeals jettisoned this Court's "money-blind" approach to the evaluation of alternative avenues of communication established in *Renton* and *Young*, it persisted with an analysis in conflict with the

current view of four other circuits.[6] These cases make it clear that the City is not required to provide cut-rate real estate prices or economic success to adult businesses it restricts or relocates.

In *D.G. Restaurant Corp. v. Myrtle Beach, supra*, 953 F.2d 140, the Fourth Circuit upheld an ordinance that restricted the location of businesses that permitted nudity. In response to the business owner's claim that the local law relegated adult businesses to poorly lit sites industrial areas, far from tourist-oriented businesses, the court responded,

> "The decision to restrict adult businesses to a specific area does not oblige the City to provide commercially desirable land. See *Renton*, 475 U.S. at 54, 106 S.Ct. at 932." *Id.*, 953 F.2d at 147.

Recent Fifth Circuit opinions have held true to the case of *Hart Book Stores, Inc. v. Edmisten, supra*, 612 F.2d 821. That case upheld a North Carolina statute forbidding two adult establishments in a single building. The Court of Appeals declared:

> "Zoning and other regulations for the public welfare frequently are an

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[6] *D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (5th Cir. 1979), *cert. den.*, 447 U.S. 929 (1980); *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255 (5th Cir. 1992), *cert. den.*, 123 L.Ed.2d 469 (1993); *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir. 1992), *cert. den.*, 121 L.Ed.2d 227 (1992); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988), *cert. den.*, 489 U.S. 1052 (1989); *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991); and *International Food and Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986).

> economic detriment to affected businesses; the fact that these carry materials protected by the First Amendment does not except them from the consequences of an otherwise valid regulation." *Id.*, 612 F.2d at 827.

In a case significant for the large metropolitan area of Los Angeles, the Fifth Circuit in *SDJ, Inc. v. City of Houston, supra*, 837 F.2d 1268, affirmed the district court's determination that sufficient alternative sites existed for the relocation of 23 topless bars under the distance separation requirements of a Houston ordinance. The plaintiffs claimed that 40 relocation sites were unavailable or unsuitable for commercial uses. Holding that "alternative sites need not be commercially viable," the court rejected this claim. *Id.*, 837 F.2d at 1277.

In *Woodall v. City of El Paso, supra*, 959 F.2d 1305, the Fifth Circuit, upon the grant of a petition for rehearing by the panel, deleted that portion of its earlier opinion (950 F.2d 255) that implied that economic restrictions might make land unavailable to adult businesses. Instead, the court stated:

> "We do not endorse appellants' formulation that land is not available for use by the adult businesses if it would be 'unreasonable' to expect adult businesses to relocate there." *Id.*, 959 F.2d at 1306.[7]

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[7] In its opinion, the Court of Appeals authorized a jury instruction that strictly limited the criteria by which land could be found to be unavailable. Unavailable land is only

> "that land with physical characteristics that render it unavailable for any kind of

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Finally, the Fifth Circuit, in *Lakeland Lounge v. Jackson, supra*, 973 F.2d 1255, held constitutional a Jackson ordinance dispersing adult entertainment businesses to light industrial zoned areas, with additional separation requirements. The court stated, in response to the district court's statement that some of the proposed locations were in remote areas of the city divorced from other retail or commercial development: "The fact that these locations do not seem particularly desirable for economic reasons does not matter." *Id.*, 973 F.2d at 1260.

The Eighth Circuit in *Alexander v. City of Minneapolis, supra*, 928 F.2d 278, dealt with a Minneapolis ordinance that restricted adult business to the central business district of the City, with additional distance separation requirements. The court, citing *Renton* and Justice Powell's concurrence in *Young*, held that the District Court improperly considered testimony that relocation sites were cost-prohibitive. *Id.*, 928 F.2d at 283.

In *International Food and Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986), the plaintiff presented evidence that one night club operator had picked a location required by the ordinance "and it was a disaster financially." *Id.*, at 1523. Other testimony focused on prohibitively high rents. *Id.*, at 1524. The Court of Appeals advised the district court that economic impact was not a standard by which to

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(fn. continued)

> development, or legal characteristics that exclude adult businesses." *Ibid.*

This was the sole restriction of the real estate market that *Woodall* permitted, and the Ninth Circuit's drastic shrinkage of that market based on economic considerations finds no support in *Woodall*.

determine the constitutionality of the ordinance and observed that in *Renton*,

> "Justice Rehnquist does not say the city may not 'limit alternative avenues of communication' but only that it may not limit them 'unreasonably.' " *Id.*, at 1526.

The Petition should be granted to reverse the Court of Appeals judgment which is in conflict with the widespread law of other circuits.

D. The Court of Appeals Judgment Conflicts With The California Supreme Court Opinion In *National City v. Wiener*

As if conflicts with *Renton, Young, Barnes* and four other circuits were not enough, the Court of Appeals, although specifically apprised by the City of the California Supreme Court case of *City of National City v. Wiener*,[8] proceeded to construct its maverick economic analysis in direct conflict with the California high court's decision.

National City's ordinance, enacted for a municipality consisting of only 3,196 acres of available land, prohibited adult businesses from locating within 1,500 feet of another adult business, a school or a public park, or 1,000 feet of any residentially zoned property. The ordinance permitted adult businesses in retail shopping centers if the frontage faced an enclosed mall or if the business was in a mall isolated from direct view of

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[8] 3 Cal.4th 832, 12 Cal.Rptr.2d 701 (1992), *cert. den.*, No. 92-1981, __ U.S. __, 126 L.Ed.2d 53 (1993).

streets and sensitive uses (3 Cal.4th at 835-837). The California court, after comprehensively citing the principles stated in *Young* and *Renton* that prohibit the courts from concern with economic impact (*National City, supra*, 3 Cal.4th at 840, 842-843), diligently applied those principles to its determination that the National City ordinance was valid. (*Id.*, at 847-849).[9]

California cities and counties are now faced with the grim prospect that ordinances may be challenged in federal court in costly litigation involving detailed proof of the economic suitability of each parcel of land that the local government has made available for adult businesses. The need for review of the Court of Appeals decision thus goes well beyond the resolution of a parochial dispute over the propriety of an interim order. The Court of Appeals decision ranges far and wide and invades the clearly established zoning powers of California's local governments.

E. The District Court Abused Its Discretion In Granting The Preliminary Injunction

This Court stated in *Doran v. Salem Inn*, 422 U.S. 922, 931, 45 L.Ed.2d 648, 659 (1975):

> "The traditioned standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to

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[9] The California Supreme Court in *People v. Superior Court (Lucero)*, 49 Cal.3d 14, 259 Cal.Rptr. 740 (1989) cited to those portions of *Renton* that rejected the argument that sites for adult businesses had to be commercially viable (49 Cal.3d at 25, n.6).

> prevail on the merits. It is recognized, however, that a district court must weigh carefully the interests on both sides. Although only temporary, the injunction does prohibit state and local enforcement activities against the federal plaintiff pending final resolution of his case in the federal court. Such a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger* [*v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669 (1971)]."

The standards set forth in *Doran* command reversal of the Court of Appeals. The City's ordinance is consistent with the time, place or manner regulations upheld by *Renton* and *Young*, and the balance of harms in this case favors petitioner.

1. Respondents Cannot Prevail On the Merits

Based on the law of this Court as stated in *Renton* and *Young*, and the facts already before the lower courts set forth above, respondents are not likely to prevail on the merits of their lawsuit.

The City's law on its face is consistent with the content-neutral adult business zoning ordinances sanctioned by *Young, Renton* and other circuit courts. It was enacted not to control expression but to combat the degrading effects adult businesses have on surrounding neighborhoods. Moreover, more than adequate avenues of communication exist.

As to the respondents' claims of vagueness, all except TOPANGA PRESS concede they are "adult" within the definitions of Section 12.70 and therefore have no standing under *Young*. See, *id.*, 427 U.S. at 58-59, 49 L.Ed.2d at 319. Furthermore, numerous courts have held the phrases "substantial," "significant portions of" or similar phrases in adult zoning ordinances to be sufficiently clear and definite to comply with due process. *Nortown Theatres, Inc. v. Gribbs*, 373 F.Supp. 363, 367 (E.D. Mich. 1974); *15192 Thirteen Mile Road v. City of Warren*, 626 F.Supp. 803 (E.D. Mich. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982); *Stansberry v. Holmes*, 613 F.2d 1285, 1290 (5th Cir. 1980), *cert. den.*, 449 U.S. 886 (1980); *Hart Book Stores, Inc. v. Edmisten, supra*, 612 F.2d at 833-834.

Therefore, respondents cannot expect to prevail on the merits at trial.

2. The Balance Of Harms Decidedly Favors Petitioner

In this case, no cognizable harm can come to respondents. They are entitled to avail themselves of the exception provisions in Section 12.2A20(a), which they have not challenged. Without a determination by the City that they may not remain in their current locations, they have suffered no harm. In the event locations are found for them under the exception provisions, or if they find other locations independently, any economic disadvantage in obtaining the sites, or lack of commercial success once the businesses are relocated, is not cognizable after *Renton*.

The only type of harm that this Court has recognized in this type of case is the unreasonable diminution of

alternative avenues of communication for First Amendment expression. *Young*, 427 U.S. at 78, 49 L.Ed.2d at 330 (Powell, J., conc.). Yet nothing on the face of the ordinance or in the evidence before the trial court indicates that the City has placed any unreasonable restrictions on the location of adult businesses.

Balanced against this lack of harm to respondents is the serious harm incurred by the City by virtue of its inability to enforce these laws. Respondents' continued operation produces not only the theoretical harm based upon the "concerns for federalism" mentioned in *Doran*; the harm is palpable based on the evidence of secondary effects amassed by the City.[10]

In conclusion, the harm to the City so far outweighs any harm to respondents that the District Court's injunction was an abuse of discretion.

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[10] Nor is the harm to the City somehow alleviated because of what the lower courts have referred to as the City's "forebearance of enforcement." App. B 18, D 3. The City provided in 1986 for a two-year amortization period and a three-year extension for hardship or an extended lease. The lower courts' determination that the City's careful regulations constitute "forebearance" that diminishes the harm to the City stands these laws on their heads. This judicial policy, if it became infectious, would discourage the enactment of reasonable amortization periods.

F. The Complaints Were Not Filed Within The Statute Of Limitations For Actions Under 42 U.S.C. § 1983

The applicable statute of limitations established by *Wilson v. Garcia*, 471 U.S. 261, 85 L.Ed.2d 254 (1985), for actions filed pursuant to 42 U.S.C. § 1983 in California is one year.[11]

The adult business operators that own enterprises harboring more than one adult business are challenging the constitutionality of Ordinance No. 157,538, which became effective May 13, 1983. The applicable statute of limitations expired April 17, 1986, one year after the *Wilson* decision. STUART PARR and BRAND X first challenged the ordinance in federal court in 1989. The action in which the remainder of the respondents joined was filed in February 1991.

The most recent law challenged by respondents, Ordinance No. 161,111, establishing the 500-foot separation of adult businesses from residential zones, was effective on May 18, 1986. The one-year statute of limitations period ended in May 1987. Therefore, the complaints setting forth respondents' challenges to Ordinance No. 161,111 filed in December 1990 (STUART PARR) and in February 1991 are beyond the statute of limitations.

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[11] *Usher v. City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987). For causes of action arising prior to *Wilson*, which was decided April 17, 1985, the applicable statute of limitations is either three years from the time the cause of action arises or one year from *Wilson*, depending on which period expires first. For causes of action arising after *Wilson*, the period is one year.

G. The Claims Of Respondents Made In This Case Are Not Ripe For Adjudication

In this case, respondents have asked the federal courts to intervene at a stage where no harm has come to them or can be anticipated by virtue of any application of Section 12.70. As stated previously, no respondent has asserted that it cannot find a location for a business in the City. Furthermore, no respondent has availed itself of the exception provisions in Section 12.22A20(a), which would allow them to remain in their current locations. Without any evidence that the particular respondents are presently affected in any way by the City's ordinance, this case is not ripe for adjudication.

This Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 18 L.Ed.2d 681, 691 (1967), set forth a two-pronged ripeness test, requiring the courts

> "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

In *Reno v. Catholic Social Services*, __ U.S. __, 125 L.Ed.2d 38, 113 S.Ct. 2485 (1993), the Court decided that certain aliens had not demonstrated the ripeness of their challenge to Immigration and Naturalization Service regulations implementing the Immigration Reform and Control Act's provisions that allowed application for temporary and permanent residential status. The Court reasoned that, since the regulations only limited access to the benefit of residential status conferred after an alien took affirmative steps to apply under the Act, those plaintiffs who had not applied and had their application denied normally would not have an action that was ripe for adjudication. *Id.*, 125 L.Ed.2d at 56-58. In

this case, where no respondent has applied for the benefit of an exception and been rejected, the action is similarly not ripe. *See also Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 192, 87 L.Ed.2d 126, 142 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 91 L.Ed.2d 285 (1986). Therefore this case should be dismissed as prematurely brought.

CONCLUSION

The Court of Appeals in this case has directly confronted this Court on the issue of local adult business regulation. The Petition should be granted to permit Los Angeles and other local governments affected by the Court of Appeals decision to act effectively in this area again.

Dated: December 20, 1993.

Respectfully submitted,

JAMES K. HAHN,
City Attorney

CLAUDIA MCGEE HENRY,
Senior Assistant City Attorney

ANTHONY SAUL ALPERIN
Assistant City Attorney

L. WAYNE MOONEY
Deputy City Attorney and
Counsel of Record

Attorneys for Petitioner
CITY OF LOS ANGELES